SUPREME COURT, U. S.
AUG 16 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1961

No. 322

U. S. HEALTH CLUB, INC.,
Petitioner,

AGAINST

WILLIAM MAJOR, Postmaster, Bergenfield, New Jersey,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on June 15, 1961, reversing the judgment of the United States District Court for the District of New Jersey entered on April 25, 1960, permanently enjoining the enforcement of a postal fraud order issued against petitioner by the Judicial Officer of the Post Office Department.

Citations to Opinions Below

The opinion of the District Court enjoining the enforcement of the fraud order issued under the alleged authority of 39 U. S. C. 259 and 732 and granting summary judgment in favor of petitioner is reported at 182 F.

Supp. 759 (D. C. N. J. 1960). The opinion of the Court of Appeals reversing the judgment of the District Court is printed in Appendix A, *infra*, pages 6-12 and is not officially reported. The judgment of the Court of Appeals is printed in Appendix A, *infra*, page 13.

Jurisdiction

The judgment of the Court of Appeals was entered on June 15, 1961 (Appendix A, *infra*, page 13). The mandate of the Court of Appeals has been stayed pending the filing of the instant writ of certiorari. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented

Whether the quasi-judicial power (decision-making function) of an administrative agency head under the Administrative Procedure Act may be delegated by him to any other individual, absent express statutory authority.

Statutes Involved

The statutory provisions involved are: The Administrative Procedure Act, 5 U. S. C. 1006(a), 1007(a) and 1011; 39 U. S. C. 259 and 732; Section 1(b) of Reorganization Plan No. 3 of 1949, 63 Stat. 1066, 14 Fed. Reg. 5226. They are printed in Appendix B, *infra*, pages 14-17.

Statement

An administrative proceeding under the Administrative Procedure Act, 5 U. S. C. 1001 *et seq.* was initiated by the Post Office Department on January 15, 1959, alleging

violations of Sections 259 and 732 of Title 39 of the U. S. Code. An administrative hearing was held and a final decision was rendered by a person referred to as a "Judicial Officer".

The Judicial Officer was an employee of the Post Office Department to whom the Postmaster General had ostensibly delegated his quasi-judicial power to render final agency decisions. The aforesaid decision of the Judicial Officer involved the issuance of a fraud order which prohibited the petitioner from using the United States mails in the conduct of its business.

Following the issuance of the fraud order by the Judicial Officer, the petitioner commenced the instant action in the United States District Court for the District of New Jersey to restrain its enforcement upon the grounds (1) that the Judicial Officer was without authority to issue the agency decision under the provisions of the Administrative Procedure Act, and (2) that the fraud order was not supported by substantial evidence. On April 14, 1960, the District Court permanently enjoined the enforcement of the fraud order on the ground that it was not supported by substantial evidence.

On June 15, 1961, the United States Court of Appeals for the Third Circuit reversed the ruling of the District Court holding (1) that the individual known as the Judicial Officer could exercise the quasi-judicial decision-making power of the Postmaster General, and (2) that the fraud order was supported by substantial evidence.

The instant petition for a writ of *certiorari* seeks review of the ruling of the Court of Appeals that the individual known as the Judicial Officer could exercise the quasi-judicial power of the Postmaster General.

Reasons for Granting Writ

This case involves a basic issue of the exercise of judicial power by persons other than the judiciary within the area encompassed by the Administrative Procedure Act. A secondary question is presented involving the interpretation of Section 1(b) of Reorganization Plan No. 3 of 1949, 63 Stat. 1066, 14 Fed. Reg. 5225, as to its compliance with Section 12 of the Administrative Procedure Act as interpreted by this Court in *Marcello* v. *Bonds,* 349 U. S. 302 (1955); *Wong Yang Sung* v. *McGrath,* 339 U. S. 333 (1950).

Petitioner respectfully submits that the quasi-judicial decision-making power granted by Congress in Section 8(a) of the Administrative Procedure Act [5 U. S. C. 1007(a)] may be exercised solely by those individuals therein named and may not be delegated by said individuals to any other person, unless expressly authorized by Congress. Petitioner further respectfully submits that Section 1(b) of Reorganization Plan No. 3 of 1949 does not comply with the requirements of Section 12 of the Administrative Procedure Act, as laid down by this Court in the *Marcello* and *Wong Yang Sung* cases, *supra,* to effect a change in Section 8(a) of the Administrative Procedure Act.

The United States District Court in *Borg-Johnson Electronics, Inc.* v. *Christenberry,* 169 F. Supp. 746 (S. D. N. Y. 1959), has heretofore ruled that Section 1(b) of Reorganization Plan No. 3 of 1949 does not comply with the criteria laid down by this Court in the *Marcello* and *Wong Yang Sung* cases, *supra,* so as to effect a change in the provisions of the Administrative Procedure Act. The Court of Appeals in the instant case however, has held that Section 1(b) of the said Reorganization Plan

does comply with Section 12 of the Administrative Procedure Act so as to create a change in Section 8(a) of the Act, to permit a delegation of the decision-making power therein provided for.

A ruling upon these issues will resolve questions basic to the quasi-judicial functioning of our administrative agencies.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MILTON A. BASS,
SOLOMON H. FRIEND,
HAROLD FRIEDMAN,
Attorneys for Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,330

U. S. HEALTH CLUB, INC.

v.

WILLIAM MAJOR, Postmaster,
Bergenfield, New Jersey,

Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued March 20, 1961

Before KALODNER, STALEY and HASTIE, *Circuit Judges.*

Opinion of the Court

(Filed June 15, 1961)

By STALEY, *Circuit Judge.*

This appeal requires us to determine whether a Post Office Department judicial officer can make a final agency decision under § 8, 5 U.S.C. § 1007, of the Administrative Procedure Act ("APA") and issue a fraud order although

not qualified to act as a hearing officer under § 7, 5 U.S.C. § 1006 of the APA, and if so, whether the order issued here is supported by substantial evidence.

The Post Office Department instituted proceedings charging U.S. Health Club, Inc., appellee, with conducting a fraudulent enterprise through use of the mails in connection with the sale of two products called Super-Coronaid and Choless. These products contained certain unsaturated fatty acids, together with vitamins and other substances. In its advertising, appellee claimed that when used as directed these products would, by eliminating or substantially reducing formation of cholesterol deposits on the walls of blood vessels, prevent heart diseases and hardening of the arteries.

Based in large part on the testimony of Doctor Kenneth D. Campbell, a hearing examiner recommended, and a judicial officer ordered, issuance of a fraud order under the provisions of 39 U.S.C. §§ 259 and 732. Appellee commenced an action in the district court, contending, inter alia, that the order was not supported by substantial evidence, and requested injunctive relief. The United States, on behalf of the local postmaster, appellant, placed the administrative record in evidence and moved for summary judgment. The district court, construing Dr. Campbell's testimony as an opinion on the efficacy of the two products, held, citing American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902), that the order was not supported by substantial evidence and enjoined enforcement. 182 F. Supp. 759 (D.N.J. 1960).

Two issues are raised by this appeal. First, to the appellee's contention that the fraud order was, in effect, a nullity because the judicial officer who made the final agency decision under § 8(a), 5 U.S.C. § 1007(a) of the

APA, lacked the power to do so because he was not authorized to conduct hearings under § 7(a), 5 U.S.C. § 1006(a) of the APA, the appellant asserts that the Postmaster General can delegate his power to make a final decision under § 8(a) to a judicial officer since such a function is different from conducting hearings and receiving evidence. This being so, the appellant further contends that enforcement of the fraud order should not be enjoined because there is more than substantial evidence in the record to support it. We agree with appellant on both points.

Section 7(a) governs who may preside at the taking of evidence by specifically limiting that function to (1) the agency; (2) one or more members thereof; or (3) a hearing examiner as provided for in § 11, 5 U.S.C. § 1010 of the APA. Our review of the legislative history of the APA[1] makes it clear that one of its principal purposes was to limit the conduct of hearings and reception of evidence to specially qualified persons who were to be an essential part of the administrative adjudicatory process. They are given the power to make initial decisions which become the final agency decision unless reviewed by appeal to the agency or upon motion by the agency itself. § 8(a), 5 U.S.C. § 1007(a). Thus, it is seen that the hearing officer is the touchstone of the adjudicatory process, and the initial decision made by him "which may dispose of the case or be the statement of it from which appeal may be taken to the heads [should] carry a hallmark of fairness and capacity."[2] The APA attempts to make hearing officers semi-autonomous and not, as had been charged in

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[1] 92 Cong. Rec. 2157, 5652, A-2984, 79th Cong., 2d Sess., 1946.

[2] Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st Sess., 1941, pp. 43-44.

the past, "mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations." Ramspeck v. Federal Trial Examiners Conference, 345 U. S. 128, 131 (1953). No such special status was contemplated for those who make the final agency decision. Section 8(a) permits a reviewing official to make a final decision based on the record made before and screened by an independent hearing officer. As is readily apparent, a final decision under § 8(a) is not, in any manner, similar to conducting a hearing. In addition, the plain words of that section do not require that the final decision be made only by those enumerated with particularity in § 7(a). The right of the Postmaster General to delegate his power to make a final decisions is authorized by § 1(b) of Reorganization Plan No. 3 of 1949, 63 Stat. 1066, 14 Fed. Reg. 5225. Were it otherwise, the Postmaster General, the head of what has been described as the world's largest business, would be called on daily to make a great number of final decisions under § 8(a).

Greene v. Kern, 178 F. Supp. 201 (D.N.J. 1959), and United States Bio-Genics Corp. v. Christenberry, 173 F. Supp. 645 (S.D.N.Y. 1959), affirmed, 278 F. 2d 561 (C.A. 2, 1960), are on point and support our conclusion, while Borg-Johnson Electronics, Inc. v. Christenberry, 169 F. Supp. 746 (S.D.N.Y. 1959), cited by appellee, is inapposite for there the judicial officer sat as a hearing officer during the entire proceedings conducted under § 7.

Both parties agree, as indeed they must, that before a fraud order can be issued it must be found, first, that the claims made through use of the mails were false, and that such claims were made with intent to deceive. Further, such an order must be enforced so long as it is supported

by substantial evidence. The parties part ways, however, as to the competency of Dr. Campbell's testimony, which is the sole basis for the order, i.e., whether he testified as to what the consensus of medical opinion was concerning appellee's claims or simply stated what his opinion was in this regard.

This is an area in which difficulty of proof frequently confronts law enforcement officials. Whether the claims made are false is usually a matter more susceptible of proof than establishing an intent to deceive. In a landmark decision, the Supreme Court in Reilly v. Pinkus, 338 U.S. 269, 276 (1949), said: "An intent to deceive might be inferred from the universality of scientific belief that advertising representations are wholly unsupportable * * *."

Dr. Campbell was a well qualified witness. Having previously served as a Lieutenant Colonel in the Air Force Medical Department, in 1946 he was employed by the United States Food and Drug Administration, and at the time of his testimony he was Associate Medical Director of Drugs and Devices, and was engaged in part time practice while serving on the staff of two hospitals. For approximately eight months before he testified, Dr. Campbell studied medical literature, including various reference materials and brochures concerning the use and effect of unsaturated fatty acid preparations. He also examined descriptions on the labels of bottles containing Super-Coronaid and Choless and familiarized himself with the effect in treatment of heart and arterial diseases of the various ingredients in those products.

Dr. Campbell testified that it was the consensus of informed medical opinion that appellee's allegations con-

cerning Super-Coronaid and Choless were false. He also indicated that the correlation between cholesterol levels in the blood stream and arterial diseases has not as yet been demonstrated or accepted by a consensus of expert medical opinion although some few experts do believe that it exists. Some medical experts believe that by altering diet so that small quantities of animal fat are ingested, and unsaturated fatty acids added to it, the blood cholesterol level may be reduced, thereby warding off heart and arterial diseases. But this was not the crucial part of his testimony. He went on to add that it is the universality of expert medical opinion that quantities of unsaturated fatty acids as small as those contained in Super-Coronaid and Choless would have no effect in preventing heart and arterial diseases. A daily dose of those products would give the taker only two or three grams of unsaturated fatty acids, which, all medical experts agree, would be totally ineffective. In addition, he testified that according to the consensus of medical opinion, the use of unsaturated fatty acids, without an accompanying revision in diet involving alteration of the over-all caloric fat intake, would be of no beneficial effect. This testimony clearly established, as a fact, the state of medical opinion respecting appellee's claims, and it was not an expression of Dr. Campbell's opinion on these matters, as the district court erroneously concluded. Owen Laboratories, Inc. v. Schroeder, 284, F. 2d 445 (C.A.7, 1960).

A few words need be said about American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902), on which the district court relied. There, the allegedly false claims were based upon a belief that certain mental techniques could control physical illness. In its opinion, the Court made it clear that there were two conflicting schools

of thought on the effect of the mind over disease, and that scientific knowledge had not as yet reached the point where any universality of opinion existed. Here, however, Dr. Campbell's uncontradicted testimony established a universality of medical opinion on the crucial issues.

The judgment of the district court will be reversed and the cause remanded with directions that judgment be entered in favor of the appellant.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix A

Judgment

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,330

U.S. HEALTH CLUB, INC.

vs.

WILLIAM MAJOR, Postmater,
Bergenfield, New Jersey,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: KALODNER, STALEY and HASTIE, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the cause remanded with directions that judgment be entered in favor of the appellant.

Attest:

IDA O. CRESKOFF
Clerk

June 15, 1961

APPENDIX B

Statutes

Section 7 of the Administrative Procedure Act, 5 U.S.C. 1006, provides, *inter alia*, that:

> "(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards of other officers specifically provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.
>
> "(b) Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to * * * (8) make decisions or recommend decisions in conformity with section 8 * * *."

Section 8 (a) of the Administrative Procedure Act, 5 U. S. C. 1007 (a), insofar as it relates to agency decisions in adjudicatory proceedings, provides, in part, as follows:

> "In cases in which the agency has not presided at the reception of the evidence, the officer who presided * * * shall initially decide the case or the

agency shall require * * * the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall * * * have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision * * *."

Section 12 of the Administrative Procedure Act, 5 U.S.C. 1011, provides in part as follows:

> "No subsequent legislation shall be held to supersede or modify the provisions of this chapter, except to the extent that such legislation shall do so expressly."

39 U. S. Code 259 provides as follows:

The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other

letters or mail matter arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. Nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme, or device, that remittance for the same may be made by mail to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself.

39 U. S. Code 732 provides as follows:

The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any post-

master to said person or company of any postal money orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders.

This shall not authorize any person to open any letter not addressed to himself.

The public advertisement by such person or company so conducting any such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by means of postal money orders to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way.

Section 1 of Reorganization Plan No. 3 of 1949, 63 Stat. 1066, provides as follows:

> "(a) There are hereby transferred to the Postmaster General the functions of all subordinate officers and agencies of the Post Office Department, including the functions of each Assistant Postmaster General, the Purchasing Agent for the Post Office Department, the Comptroller and the Bureau of Account.
>
> "(b) The Postmaster General is hereby authorized to delegate to any officer, employee, or agency of the Post Office Department, designated by him such of his functions as he deems appropriate."